IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1194

REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner contends that the Respondents, (hereinafter referred to as "South Dakota"), violated the Commerce Clause when they restricted sales of State owned manufactured cement to residents of the State of South Dakota.

The Court of Appeals reversed the District Court, (Pet. Appendix "A"), holding that the Commerce Clause of the United States Constitution does not limit the State of South Dakota's power to choose whether, to whom, and on what condition it sells its owned manufactured goods as opposed to those goods placed in the stream of commerce by private citizens.

STATEMENT

In 1919, the State of South Dakota, as authorized by its constitution, created a Cement Commission by legislative charter to carry out the manufacture, distribution and sale of cement as "works of public necessity and importance in which the State may engage". S.D. Constitution, Art. XIII, §10; S.D.C.L. Anno. § 5-17-1, -2, -9. (Pet. App. C. p. 21, 22).

In 1978, a serious shortage of manufactured cement arose in South Dakota, and on June 1, 1978, the Commission reaffirmed a policy (Pet. App. C, p. 14) of supplying all South Dakota customers first and honoring all contract commitments, with the remaining volume to be allocated on a first come, first served basis. As a result of the shortage, no cement was sold to out-of-state customers.

The District Court had held that this policy violated the Commerce Clause and the Privileges and Immunities Clause of the U.S. Constitution, Art. I, §8, cl. 3 and Art. IV, §2, cl.1.

The Court of Appeals reversed the District Court and vacated the injunctions, holding that the Commerce Clause does not prohibit South Dakota from participating in the market and exercising the right to favor its own citizens over others. *Reeves, et al. v. Kelley, et al.*, 586 F.2d 1230, 1233 (1978).

REASONS FOR REFUSING THE WRIT

1. *COMMERCE CLAUSE.* Petitioner argues that the decision of the Court of Appeals should be reviewed because it is not in accord with previous decisions of this Court in the application of the Commerce Clause. Petitioner blindly overlooks the decision of this Court relied upon by the Court of Appeals. Petitioner is in error in relying upon the rationale of decisions from *"Gibbons v. Ogden*, 9 Wheaton 1, 6 L.Ed.23 (1824), to *City of Philadelphia v. New Jersey*, — U.S. —, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978)." (Pet. p.8).

Petitioners reliance on the constitutional principles controlling these cases proceeds from a fundamental misconception of the difference between a state using its legislative powers to restrict or burden commerce between citizens in interstate commerce and a state selling its owned manufactured product. The Court of Appeals correctly distinguished petitioner's cases. The factual background in every one of the cases relied upon by petitioner was an attempt by the State to regulate the channels of interstate commerce to prevent or burden a private citizen's access to the channels of commerce.

The Commerce Clause is a delegation to Congress of the power "to regulate commerce among the several States".

The delegation of the power to Congress forbids the States from exercising its governing powers to restrict or burden interstate commerce. The purpose of the constitutional restriction is to enable citizens to market their goods freely taking advantage of the free enterprise system and to avoid unnecessary burdens on commerce. *Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794, 49 L.Ed.2d 220, 96 S.Ct. 2488 (1976).

All the cases relied upon by the petitioner[1] address

[1] *Gibbons v. Ogden, supra,* involved regulation by New York State limiting navigation of navigable waters to one individual.

City of Philadelphia v. New Jersey, supra, this court struck down a New Jersey statute preventing privately owned articles of trade (sludge) from being shipped to and buried in privately owned New Jersey land. The court was careful to point out in a footnote:

the specific prohibition that the state shall not restrict a private citizen in the marketing of his property. No case relied upon by the petitioner, holds that the State is regulating commerce when it sells its owned manufactured product.

2. *STATE OWNERSHIP.* This Court of Appeals properly decided this case in accord with previous decisions

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"We express no opinion about New Jersey's power consistent with the Commerce Clause, to restrict to state residents access to state owned resources." (footnote 6, 57 L.Ed.2d 484)

H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 532-533, 69 S.Ct. 657, 662, 93 L.Ed. 865 (1949) and *Baldwin v. Seelig, Inc.*, 294 U.S. 527, 55 S. Ct. 497, 79 L.Ed. 1032 (1935), involved the State's exercise of its governmental regulatory function in an attempt to regulate the sale of imported milk by fixing minimum prices to be paid by in-state dealers to producers of milk and prohibiting sales of milk brought into the state from out-of-state private citizens unless minimum prices were paid to private producers. Any state regulation of milk distribution conflicted with the Federal Milk Marketing Act.

Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L.Ed. 2d 174 (1970) involved state regulations requiring fruit producers to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.

West v. Kansas Natural Gas Co., 221 U.S. 229, 31 S. Ct. 564, 55 L.Ed. 716 (1911) and *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S. Ct. 658, 67 L.Ed. 1117 (1922) both involved statutes aimed at the regulation of privately owned products and their movement in interstate commerce.

Foster-Fountain Packing Company v. Haydel, 278 U.S. 1, 49 S. Ct. 1, 73 L.Ed. 147 (1928) and *Johnson v. Haydel*, 278 U.S. 16, 49 S. Ct. 6, 73 L.Ed. 155 (1928) dealt with the State attempting to regulate commerce in privately owned products. Louisiana had passed a statute declaring all shrimp to be property of the State and required the shrimp to be packed and canned within the State before being shipped out of state. The Supreme Court found the Commerce Clause to be violated because the shrimp had become privately owned articles when reduced to possession by private industry; but, only because the purpose of the statute was to promote in-state processing as opposed to in-state consumption. However, the court noted that had the State chosen to retain ownership over all shrimp in its territorial waters, it could have restricted the shrimp for the consumption and use of its citizens only (278 U.S. 1, 13).

Douglas v. Seacoast Products, Inc., 431 U.S. 265, 97 S. Ct. 1740, 52 L.Ed.2d 304 (1977) this court held that Federal statute on licensing fishing vessels preempted Virginia statutes which in effect prohibited nonresidents of Virginia from fishing in Chesapeake Bay. Petitioners' reliance is again misplaced because the case turned on the Supremacy Clause and not on the Commerce Clause.

of this Court. The State of South Dakota, in making a marketing decision in the sale of its cement, is not limited by the Commerce Clause in its power to choose whether, to whom, and on what conditions it markets its goods.

> "As a government providing a public service and utilizing the money and resources of its residents, it has the right and perhaps even an obligation to consider their common good and conserve their resources so long as it does not do so by attempting to regulate or control commerce among the states." 586 F.2d at 1233.

The Court of Appeals correctly relied on *Toomer v. Witsell*, 334 U.S. 385, 409, 68 S. Ct. 1156, 92 L.Ed. 1460 (1948); *Hughes v. Alexandria Scrap Corp., supra*, and *American Yearbook Co. v. Askew*, 339 F.Supp. 719 (M. D. Fla.), aff'd mem., 409 U.S. 904, 93 S. Ct. 230, 34 L.Ed.2d 168 (1972).

The *American Yearbook* case involved a Florida statute which required all public printing to be done in the State. The case held that the Commerce Clause. in striking down State statutes regulating private industry, is not applicable to State statutes specifying conditions of State purchases. The rationale of the *American Yearbook* concerning State purchases logically would apply to State sales.

Petitioner attempts to criticize the Court of Appeals' reliance upon *Hughes v. Alexandria Scrap Corporation, supra*, by distinguishing a State subsidy program from State sales. This distinction is without merit. The subsidy program dealt with subsidies to privately owned car bodies within the State, and properly withstood the constitution-

al muster of the Commerce Clause. Surely if a subsidy to privately owned products is constitutional, a fortiori, the state, in the sale of its property, can prefer its citizens.

3. *WILD GAME DOCTRINE.* Petitioner erroneously relies upon criticizing the "wild game" ownership theory to erode the logic of the Court of Appeals. (Pet. p. 13). Justice Holmes, in his statement that State claimed ownership of migratory birds, "is to lean on a slender reed", in *Missouri v. Holland*, 252 U.S. 416, 434, 40 S. Ct. 382, 64 L.Ed. 641 (1920), was questioning the title that a state could legitimately claim to migratory birds. Certainly this analogy can be of little comfort to petitioner as it can hardly question the title of South Dakota to its owned manufactured cement. This court, however, in the recent case of *Baldwin v. Fish and Game Commission of Montana*, — U.S. —, 56 L.Ed.2d 354 at 367, 98 S. Ct. 1852 (1978), refused to recognize the demise claimed for the rationale of the wild game doctrine and legislation. In any event the Court of Appeals did not rely upon the wild game cases for its opinion.

4. *ANTI-TRUST ARGUMENT.* Petitioner is in plain error in assuming that South Dakota violated the Sherman Anti-Trust Act in determining to whom and on what terms it chooses to sell its product. This was not an issue presented by petitioner to either the District Court or the Court of Appeals. 42 L.Ed.2d 946. The argument is specious in view of the recent affirmation of the *Parker v. Brown* doctrine in *New Motor Vehicle Board of the State of California, et al. v. Orrin W. Fox Co.*, — U.S. —, 58 L.Ed.2d 361, 99 S. Ct. 403 (1978).

5. *BURDEN OF PROOF.* Petitioner's final argument would place the burden of proof on a state to show that benefits resulting to local interests overcome impositions placed on interstate commerce, relying upon *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 97 S.Ct. 2434, 2446, 53 L.Ed.2d 383 (1977). Again Petitioner relies upon a case where a state, through its regulatory powers, imposes restrictions upon private individuals in the commerce of their products. The Hunt case involved the constitutionality of a North Carolina statute requiring all closed containers of apples sold in the state to be ungraded which caused some Washington state apple shippers extra shipping costs and therefore unnecessarily burdening commerce. A fact situation far different from South Dakota marketing its state owned manufactured cement. Justice Powell, in *Hughes v. Alexandria Scrap Corp., supra*, rejected a similar argument, holding that no independent justification was required of a state if it chose to enter into the market as a purchaser:

> "Nothing in the purposes animating the Commerce Clause forbids a State, in absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."

CONCLUSION

The Court of Appeals correctly held that the Commerce Clause does not limit the State of South Dakota's power to choose whether, to whom, and on what conditions it sells its State owned manufactured cement.

It is therefore respectfully submitted that the Petition for Certiorari should be denied.

February, 1979.

Respectfully submitted,

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